

**NORTH DAKOTA DEPARTMENT OF HEALTH
DIVISION OF WASTE MANAGEMENT**

**Review and Response to Public Comments Received for the
Proposed Petrocomp Special Waste Facility**

April 27, 2010

The North Dakota Department of Health, Division of Waste Management (Division), set a public comment period from February 12, 2010 to March 15, 2010 and conducted an informational meeting and hearing at the Bowman City Hall in Bowman, ND for the proposed new special waste treatment facility and landfill to be located in a portion of Section 8, Township 130N, Range 106W in Bowman County, ND. During the public comment period, the Division received both verbal and written comments regarding the proposed facility.

The Division prepared an application review dated February 12, 2010 (see Attachment 1). Copies of the application information, the Division's application review (NDDH Review) and a Draft Permit (Attachment 2) were available for review by the public at the Division's office and were also available electronically to interested parties. Notifications of the public hearing were published in the *Bowman County Pioneer* and the *Dickinson Press*. The Division indicated at the hearing that the final decision on the proposed special waste permit would be made by the Chief of the Environmental Health Section, who has not been involved in either the review process for this facility or in working with the applicant or consultants regarding the proposed facility.

Many comments received were similar in nature and topic. The Division has excerpted similar comments and grouped them into general categories to aid in the response. In some cases several similar comments have been summarized and restated so that one response applies to all of them. In other cases excerpts have been quoted and directly responded to. Following the comments and Division responses are conclusions, recommendations and attachments which include transcripts of the public comment hearing and copies of all written comments that were submitted.

Comments on Site Suitability, Erosion and Erosion-Prone Soils

A number of comments expressed concern about the location of the facility within the Badlands, an area of high erosion and the highly erodible nature of some soils.

Comment #1:

Vicinity soils do not merit a safe harbor for the Petrocomp project.

Comment #2:

The “Marmarth gumbo” is different than any other soil. It dissipates. You put a pipeline through it and it goes swoosh. There are other things to think about. You might say the clay is good, a good place to put stuff, but come look, I’ll show you a pipeline that washed out.

Comment #3:

One comment reiterates the North Dakota Solid Waste Management Rules, **NDAC Section 33-20-04.1-01(2)(a) General location standards**, which states:

“The following geographic areas or conditions must be excluded in consideration of a site: . . . (5) on the edge of or within channels, ravines or steep topography whose slope is unstable due to erosion or mass movement”

Response to Comments on Site Suitability, Erosion and Erosion-Prone Soils:

This area of Pierre Shale is quite unusual for North Dakota and can be highly erodible. The NRCS Soil Survey for Bowman County identifies water erosion as a main hazard of the Dilts and Lisam soils and the main management issue is “controlling erosion” (Capability Unit VI-SwC). While the drawings submitted with the application show two disposal cells are to be located on the more level plateau characterized by Oburn soils, they appear quite close to the edge of the soil unit and may be very close to the more erosive Dilts and Lisam soil areas, eroded badland topography, and various gullies, ravines and drainage ways. If a disposal cell or unit is too close to the “edge of any ravine or steep topography,” it may not meet the general location standard. The nearly level areas of Oburn soil exists because the erosion-resistant layer of gravel from the ancient terrace deposit within the Oburn soil forms a resistant layer or cap. A disposal cell too close to the edge could result in eventual erosion of the cover and eventually the waste material. It is recommended that a General Condition, **D.4.**, be added to the permit to clarify the issue, as follows:

- D.4.** The edge of any disposal cell or unit, other than the final cover, shall be at least sixty (60) to seventy-five (75) feet away from any drainage way, ravine, steep area or the edge of the Oburn soil unit to ensure that it is located in an erosion-resistant area and is surrounded by erosion-resistant materials. Additional erosion control measures may be required if needed. The areas proposed to be developed or used for any landfill unit shall be staked prior to development and submission of the plans so that the Department can ascertain the location of the disposal unit and related structures in relation to the erosion-resistant buffer area. Prior to any construction, the owner/operator shall submit more detailed site development plans for the landfill detailing the construction of the landfill for review and approval. The plans may include some changes to the landfill location, shape, depth and design to improve erosion protection and facility efficiency, so long as it is in the general area depicted in the March 6, 2009 application and plans. The plans must be formally

approved by the Department to be included as part of this permit. No construction of the landfill shall commence until the plans are formally approved to be in accordance with this requirement.

Comments on Sage Grouse

Comment #4:

The site proposed for development is approximately one mile from two active sage grouse leks (i.e., Sections 6 & 17, Township 130, Range 106), one being the largest active lek we have in the state. Additionally, the area around Big Gumbo Creek is probably some of our best sage habitat in the state. Although a recent federal decision decided not to list the sage grouse as Threatened or Endangered, it remains a candidate species for listing. As such, management agencies are strongly encouraged to minimize future actions that might impart deleterious impacts on sage grouse populations.

While it is difficult to gauge what the specific impacts from this project will be, we believe that valuable sage habitat may be lost as a result of converting existing habitat to project features (retention pond, compost area, road, etc.). Also, as the project will result in additional traffic and disturbance on a regular basis, various breeding and nesting activities could be negatively affected in this important area. We are providing these comments for your information and consideration on the above-referenced permit.

Comment #5:

The proposed project area is located immediately to the north (within 9 miles of the Bureau of Land Management Area know *[sic]* locally as The Big Gumbo Area. This area is significant for its habitat for sage grouse. While the Interior Department did announce last Friday, March 5, that the sage grouse would not be listed at this time under the Endangered Species Act, Interior Secretary Salazar confirmed that such listing is warranted.

The #1-rated lek in North Dakota exhibiting the highest male spring count for sage grouse is within 1.13 miles of the proposed Petrocomp facility. The ND Health Department should disallow this Petrocomp facility which could be a contributing factor in pushing the .species toward listing.

Response to Comments on Sage Grouse:

NDAC 33-20-04.1-01(2)(a)(7), General Location Standards, states that “areas designated as critical habitats for endangered or threatened species of plant, fish, or wildlife” must be excluded in the consideration of a site. The U.S. Department of the Interior has not listed sage grouse as either an endangered or threatened species. The administrative code is specific and does not include species which may become threatened or endangered in the future. Based on the specific language of this section, the Division does not have the authority to exclude this area and deny the permit application based on protection of sage grouse habitat. The Department encourages the company and the North Dakota Game and Fish Department and other interested parties to

work together to minimize impact to this sensitive species. Much of the property will remain in grassland, which hopefully will continue to provide some habitat.

Comments on Distance to the Little Missouri River

Comment #6:

First, I think it is too close to the Little Missouri River; a better suited site could be found.

Comment #7:

At the same time, we sought a geomorphic setting that would not receive excessive runoff.

Comment #8:

Furthermore, intermittent drainage ways roughly 300 feet to both the north and south of said ridge are in danger of contamination. Running within .35 miles from the site, Big Gumbo Creek drains a significant area in both Montana and North Dakota, with typical spring runoff and summer flood events being a routine and normal aspect of the landscape. These drainages all feed into the Little Missouri State Scenic River only 1.4 miles distant.

Comment #9:

This all gets into the river as runoff; that's going to cost Bowman County plenty millions.

Comment #10:

An enlargement of the compost treatment facility, the design includes a berm around the entire facility to prevent water from both running on and running off the facility. On the inside, the path is sloped towards the center. Again, we've got a holding pond in the middle. The regulations call for a 25-year, 24-hour event and this particular pond is designed for a 100-year rain, 24-hour event. It also includes a two-foot freeboard if there are greater rains than that, plus another two feet of dike around the perimeter so it's well contained.

Comment #11:

Run-on/runoff control facilities for the special waste landfill as well. I think Dale has gone above and beyond any of the rules and regulations which are trying to provide extra environmental controls for this entire process.

Comment #12:

We are also concerned about the water; this site is on a hill between two drainage ways into the Little Missouri River. We want to know where is the guarantee to keep our scenic river from becoming contaminated.

Comment #13:

I have many concerns with the location of the site – highly erodible soil – drainage area within a mile of the Little Missouri River – many environmental issues . . .

Comment #14:

The site is also too close to the Little Missouri River. The engineers that planned the dikes and levees for New Orleans did not foresee what was possible of happening given the right circumstances. I believe the same could happen with this site.

Response to Comments on Distance to the Little Missouri River:

NDAC 33-20-04.1-01, General Location Standards, does not list any mandatory exclusions for distances to surface water bodies; however, a location that is within a 100-year flood plain must be excluded. Subsection (2)(b)(3) of this section states “closer than two hundred feet [60.96 meters] horizontally from the ordinary high water elevation of any surface water or wetland” should be excluded unless the applicant demonstrates there are no reasonable alternatives. The proposed location is approximately 1.4 miles from the Little Missouri River and is well above the 100-year flood plain. Based on these distances, the Division does not have the authority to exclude the area and deny the permit application based on the distance to the Little Missouri River.

The primary concern for the Little Missouri River is for uncontrolled runoff from the facility following a storm or flood event. NDAC 33-20-04.1-09(3)(b) requires that all facilities must be designed and operated to prevent run-on and runoff resulting from a 25-year, 24-hour storm event. This facility has been designed to contain all runoff from a 100-year, 24-hour storm event, plus additional two-foot free board capacity in the impoundment. In addition, there is another two-foot berm completely surrounding the facility should the containment pond overflow. The design exceeds the standards required in the solid waste management rules.

Comments on Technologically Enhanced Naturally Occurring Radioactive Material (TENORM)**Comment #15:**

Petrocomp has not addressed the requirements of a Radioactive Materials Program and has not addressed screening for Lead.

Response to Comment #15:

Permit conditions disallow acceptance of any regulated TENORM material (equal to or greater than 5 pCi/gm Radium-226 plus Radium-228 or Lead-210). Because there will be no regulated TENORM material on-site, there are no applicable regulatory requirements in the Radiation Health rules. As long as processing, blending and disposal of radioactive material does not take place in North Dakota, there are no enforceable radiation control rules that apply to their activity.

Comment #16:

One of our concerns is the radioactive content and lead content in the waste that will be trucked to this site. We keep hearing how safe it is; but how much of it will become airborne? No matter what, some will.

Response to Comment #16:

Airborne contaminants may be an issue if material in the treatment area is dry or powdery; however, the submitted operating plan recommends a 50 to 70% moisture content in the compost treatment piles. This level of moisture should suppress dust generation. This permit does not authorize delivery or management of any radioactive materials; rather, the waste must be screened to avoid acceptance of such material.

Comment #17:

In several places reference is made to TENORM. TENORM is not defined and it could included *[sic]* radionuclides other than Ra-226, Ra-228 and Lead-210. Petrocomp suggests that the following be substituted for TENORM "Ra-226 plus Ra-228 or Lead-210" *[sic]*.

Response to Comment #17:

"Technologically Enhanced Naturally Occurring Radioactive Material (TENORM)" means naturally occurring radioactive material whose radionuclide concentrations are increased by or as a result of past or present human practices. TENORM does not include background radiation or the natural radioactivity of rocks or soils. TENORM does not include "source material" and "byproduct material" as both are defined in the Atomic Energy Act of 1954, as amended (42 USC §2011 *et seq.*) and relevant regulations implemented by the United States Nuclear Regulatory Commission. For the purposes of this permit, TENORM testing will be limited to Ra-226 plus Ra-228 and/or Lead-210.

Comment #18:

. . . There are inconsistencies regarding the expression of the 5 pCi/gm limit.

Paragraph F.6.d., "exceeding 5 pCi/gm"

Paragraph F.6., last paragraph before F.7., "equal or exceed 5 pCi/gm"

Paragraph F.9., "at or 'above 5 pCi/gm"

Paragraph I.1., "less than 5 pCi/gm"

To avoid confusion, Petrocomp suggests that in all cases the limit be expressed as greater than 5 pCi/gm.

Response to Comment #18:

The expression describing radioactivities that cannot be accepted should be stated as "equal to or greater than 5 pCi/gm."

In I.6., the expression "... less than 5 pCi/gm ..." is correct.

Following are recommended changes to the Draft Permit:

Paragraph F.6.d. - Change "concentrations exceeding 5 picocuries per gram" to "concentrations equal to or greater than 5 pCi/gm."

Paragraph F.6.d, last paragraph. Change "equal or exceed 5 pCi/gm." to "equal to or greater than 5 pCi/gm" as follows:

F.6. d. Any waste material suspected to contain TENORM or likely to have accumulated NORM or TENORM in concentrations equal to or greater than 5 pCi/gm.

If the total laboratory-measured Ra-226 plus Ra-228 or Lead-210 activities are equal or greater than 5 pCi/gm, the waste will not be allowed for acceptance, treatment or disposal at this facility but shall be rejected. The owner/operator shall note the source, amount, generator and other identifying information of the rejected waste and shall notify the Department within five (5) days of the rejection of such material.

Paragraph F.9. - Change "at or above 5 pCi/gm" to "equal to or greater than 5 pCi/gm" as follows:

F.9. Should it be discovered that waste containing TENORM equal to or greater than 5 pCi/gm above the background has been delivered or accepted at the facility, the owner/operator shall immediately discontinue acceptance, treatment and/or disposal of that waste stream, shall isolate the waste material, and within one (1) working day contact the Department of the exceedance. The owner/operator shall immediately discontinue acceptance, treatment or disposal of additional waste. It may be necessary to revise financial assurance provisions, operating plans and haul material off-site to a facility approved for acceptance of such waste. The Department reserves the right to suspend additional waste acceptance, treatment and/or disposal without formal Departmental approval.

Comment #19:

Paragraph F.5. Waste streams which must be analyzed form *[sic]* Lead-210. Petrocomp suggests that the waste streams be specifically identified. It is our understanding that the potential for significant build-up of Lead-210 is limited to natural gas operations. We suggest the following: Analysis for Lead-210 will be required on waste generated from pigging operations on gas production and transmission lines and natural gas operations downstream from gas/oil separators. Petrocomp believes the requirements in paragraph F.7. will be adequate to monitor for Lead-210 in waste streams which are centrifuged.

Response to Comment #19:

Testing for Lead-210 should be required in incoming, unprocessed waste streams that may contain production waste, such as, but not limited to, pipe, pipe scale or pigging waste. The Division agrees that Condition F.7. should be adequate for wastes which go through the centrifuge process.

Comment #20:

Paragraph F.6. If the total laboratory measured radium activities or Lead- 210 activities exceed 5 pCi/gm., “total laboratory measured radium” could be construed to include Ra-224. Petrocomp suggests that “total laboratory measured Ra-226 plus,Ra-228” be substituted for “total laboratory measured radium” It is not clear that the 5 pCi/gm is net with the Ra-226 and Ra-228 contributions from natural soil background and from those materials utilized in the composting process subtracted. Petrocomp suggest that the following be inserted after 5 pCi/gm “net with the Ra-226 and Ra-228 contributions from natural soil background and from those materials utilized in the composting process subtracted.”

A cursory review of the regulations of other states which have promulgated specific TENORM regulations revealed that none of the states regulates Lead-210 at a concentration of 5 pCi/gm. In fact, several states exempt concentrations of “other radionuclides” at 150 pCi/gm. Petrocomp suggests that limiting Lead-210 concentrations to no less than 30 pCi/gm will afford the public and the environment an adequate degree of protection.

Response to Comment #20:

The Division agrees that “total laboratory measured radium” should be changed to “total laboratory-measured Ra-226 plus Ra-228” in the last paragraph of Condition F.6. To clarify the measurement of TENORM, the last paragraph of Condition F.6. should be changed to the following:

If the total laboratory-measured Ra-226 plus Ra-228 activities or Lead-210 activities equal or exceed 5 pCi/gm, the waste will not be allowed for acceptance, treatment or disposal at this facility but shall be rejected. The owner/operator shall note the source, amount, generator and other identifying information of the rejected waste and shall notify the Department within five (5) days of the rejection of such material. To address background radiation, there is no adjustment made for the background of the blending material. The 5 pCi/gm requirement is for the waste stream as measured using a Department-approved analytical method and procedures.

What other states may have in adopted TENORM rules is not germane to this permit or operations within North Dakota. Until North Dakota adopts TENORM rules, there is currently no legal basis to deviate from the current standard of 5 pCi/gm, whether it is from radium or lead isotopes.

Comment #21:

Paragraph F.9. Should it be discovered that waste containing TENORM at or above 5 pCi/gm.

It is not clear that the 5 pCi/gm is net with the Ra-226 and Ra-228 contributions from natural soil background subtracted. Petrocomp suggests that the following be inserted after 5 pCi/gm “with the Ra-226 and Ra-228 contributions from natural soil background subtracted.”

Response to Comment #21:

The Division agrees that this should be clarified. The first sentence should be changed from, “. . . at or above 5 pCi/gm has been . . . to read, “. . . equal to or greater than 5 pCi/gm above the background material has been . . .” so that Condition F.9. reads as follows (this is also shown above, in response to Comment #18):

F.9. Should it be discovered that waste containing TENORM equal to or greater than 5 pCi/gm above the background has been delivered or accepted at the facility, the owner/operator shall immediately discontinue acceptance, treatment and/or disposal of that waste stream, shall isolate the waste material, and within one (1) working day contact the Department of the exceedance. The owner/operator shall immediately discontinue acceptance, treatment or disposal of additional waste. It may be necessary to revise financial assurance provisions, operating plans and haul material off-site to a facility approved for acceptance of such waste. The Department reserves the right to suspend additional waste acceptance, treatment and/or disposal without formal Departmental approval.

Comment #22:

Paragraph I.1. Waste placed or disposed in the landfill shall be less than 5 pCi/gm Ra-226 plus Ra-228 and less than 5 pCi/gm Lead-210.

It is not clear that the 5 pCi/gm is net with the Ra-226 and Ra-228 contributions from natural soil background and from those materials utilized in the composting process subtracted. Petrocomp suggests that the following be inserted after 5 pCi/gm “net with the Ra-226 and Ra-228 contributions from natural soil background and from those materials utilized in the composting process subtracted.”

Response to Comment #23:

The Division agrees that this should be clarified. The first sentence of Condition I.1. should be changed from:

“Waste placed or disposed in the landfill shall be less than 5 pCi/gm Ra-226 plus Ra-228 and less than 5 pCi/gm Lead-210.”

to read:

“Waste placed or disposed in the landfill shall be less than 5 pCi/gm Ra-226 plus Ra-228 above background and less than 5 pCi/gm Lead-210 above background at the landfill.”

- I.1.** Waste placed or disposed in the landfill shall be less than 5 pCi/gm Ra-226 plus Ra-228 above background and less than 5 pCi/gm Lead-210 above background at the landfill. Analysis of waste for the landfill disposal shall be in accordance with a Departmentally-approved sampling and analysis plan using an approved analytical method. Prior to the onset of facility operations, the owner/operator shall provide the Department with site characterization information to establish background conditions, subject to Departmental approval. These mutually agreed background conditions shall be incorporated as part of this permit and shall be enforceable.

Additional Response to Comments on TENORM:

If Petrocomp has any plans to use their gamma spectroscopy equipment, then they must submit a Quality Assurance/Quality Control plan following the Environmental Health Section's Quality Management Plan. An outline for a Quality Assurance/Quality plan was sent to Petrocomp in July 2008.

Comments on Groundwater

Comment #24:

The wells in this area are shallow or spring fed, and the previous operation in Baker had contamination as deep as 900 feet. So, I ask you, on a gumbo hill with fractures how can he protect these water sources?

Comment #25:

The site is located in the Pierre Shale formation, there's about 1500 feet of clay below the site with no known aquifers.

Comment #26:

We used the state surface geology maps to zero in on the Pierre because this thick marine shale contains no aquifers and is essentially impervious to downward percolating fluids; a substrate of Pierre Shale would be most appropriate for a landfill

No sandy or silty layers are present on the hillsides so there should be no conduits carrying infiltrate out of the landfill as springs.

Response to Comments on Groundwater:

The Division agrees that there is not a shallow aquifer beneath the proposed site. The Fox Hills formation, which is an important aquifer in this area, outcrops approximately one and one-half miles north of the site. NDAC 33-20-04.1-01, General Location Standards, states that a site closer than 1,000 feet to a downgradient drinking water well may not be approved; however, there are no known drinking water wells anywhere in the vicinity of the site where the Pierre formation outcrops at the ground surface. The Pierre formation is generally an excellent aquitard or confining layer, preventing the movement of water or other liquids through it. Therefore, from the standpoint of groundwater protection, this site is very good.

One commenter also stated that the previous operation in Baker had contamination as deep as 900 feet. This apparently was taken from a February 10, 2010 article in the *Dickinson Press* which presented information from Mr. Tom Barth, the manager of the Fallon County Landfill. The article stated, in part: “Barth said he doesn’t think the area’s groundwater will experience any lasting effects as Leivestad’s operation went down 900 feet and the nearest groundwater at the landfill is at 10,000 feet.” This statement is confusing and unclear. Mr. Barth is not saying that contamination went down to 900 feet. He was trying to say that Lievestad’s operation went down to 900 feet to see if they would encounter groundwater and did not find any, because, according to him, the groundwater at that location is at 10,000 feet. The Division has also not received indication of any deep contamination from the Montana Department of Environmental Quality. In other communication with the Division, Mr. Barth indicated soil samples were collected from the base of the waste treatment area, which consisted of native, noncompacted soils, and petroleum impacts were not measured greater than one foot below grade.

Comments on Financial Assurance

Comment #27:

I think proper remedies have to be in place so it doesn’t cost Bowman County lots of money down the road. It might be 500 thousand today, it might be a million in five years, it might be ten million in 20 years. That’s got to be addressed. Thank you.

Comment #28:

The Bank of Baker will provide a letter of credit in lieu of a bond in an amount up to \$600,000.00.

Response to Comments on Financial Assurance:

NDAC Chapter 33-20-14 describes requirements for financial assurance at solid waste facilities. Financial assurance must be adequate to perform all closure and postclosure activities in the case that the operator is unable or unwilling to do so. This would include cleaning up the site, finishing treatment of any material that has not been fully treated, disposal of any remaining waste, closing the landfill and reclaiming the site. It also includes postclosure monitoring and maintenance of the site for a period of 30 years to ensure that problems do not occur after the

facility shuts down. The rules specify that the estimates must be based on hiring a third party to complete the closure activities and also specify what mechanisms may be used to ensure that the money is readily available to the Department if needed. The initial estimates were submitted with the permit application; however, a condition was placed in the permit requiring a new estimate be performed prior to operation of the facility based on the most current costs. Chapter 33-20-14 also requires that financial assurance estimates be updated annually and include a factor for inflationary increases. The previous estimate was approximately \$526,000, and the Bank of Baker has submitted letters to the Division stating that they are prepared to issue an irrevocable Letter of Credit up to \$600,000 to the Department on behalf of Mr. Leivestad. These financial assurance provisions meet the requirements of the state solid waste management rules.

Comments on Suitability of Mr. Leivestad as Operator (Disclosure)

A number of comments were received, such as the following, which questioned Mr. Leivestad's suitability as an operator of the facility due to problems with past operations in Montana.

Comment #29:

. . . Dale Leivestad has proven he is not responsible enough to oversee a site like this – per his actions in Fallon Co. MT.

Comment #30:

Even with the best of practices, for which this applicant has instead proven negligent, accidents happen. Petrocomp's history of non-compliance, and the geological character of this proposed site warrant denial of this application for permit.

Now, when Dale was involved with this before, they did not do everything that they are going to do now; they did not put the liners in like they did and so on. That is stuff that Dale has learned by mistakes in the past and he knows this has got to be. ... If Dale makes this mistake in this process and the health department shuts him down, there's a financial assurance that this will be cleaned up. Dale has had to put that forward. So you don't have to worry about it being cleaned up

Comment #31:

But as it turned out in the end, things weren't so good. We were partly part to fault, Dale was at fault, DEQ had changed personnel, things weren't the same there, the original people first there we were dealing with when this started permitting that area were different when we ended.

Comment #32:

. . . when this first came up to put it in North Dakota, I made a special trip over to look at the operation in Baker, and I've never seen such a filthy disgusting mess. Oil ran over everything, tanks that were rusted through, leaking all over the country, dikes built up catching the runoff, and I honestly believe that anybody that actually looked at the operation they ran in Baker,

would never allow this company to ever do it We're producing this waste here, something has to be done with it, but D&M is not the company that we want to do it. Anybody that's seen the mess they left in Baker would never even consider them.

Comment #33:

The permit applicant has an established track record in managing a similar facility in Montana which must be carefully considered before granting the requested permit. An October 5, 2007 informational packet received by the North Dakota Department of Health (NDDH) from Fallon County, MT contains a laundry list of management problems associated with Petrocomp's Fallon County Landfill facility. The applicant walked away from that operation and Fallon County states that: "they did incur substantial expense cleaning up the Fallon County Landfill site." When considering a manager/operator of a facility that deals with materials that have the potential to cause harm to public health and the environment, as this facility will, common sense dictates that you would require that individual or company to have impeccable credentials in order to minimize the risk of catastrophic consequences. Clearly, Petrocomp and Dale Leivestad's incompetence in operating the Fallon County Landfill proves them unqualified and undesirable to operate a similar facility in Bowman County, no matter how much they say that they have changed. There is a very real and valid question as to their ability to properly and safely run the proposed Bowman facility. We should not be gambling with the public and environmental health of our state to see if Mr. Leivestad and Petrocomp "have learned their lesson."

Comment #34:

He could not or would not comply with Montana requirements. What has he done to make you think he is capable now? . . . The biggest indicator of a person's future behavior is past behavior. Mr. Leivestad's lack of credibility should be basis for denial.

Comment #35:

From the onset of the failures of the soil treatment facility in Montana, I said I was responsible for the problems, I stand by that statement.

The process has not been, nor is the issue. The process works. Upon closure of the soil treatment facility in Montana the final tests related to TPH concentrations confirmed that the treatment was still successful.

It would not be accurate to say that we did everything right at Fallon County. What is accurate is that as a result of the experience and knowledge gained from both our successes and failures in Montana, we have taken steps to address, respond, correct and insure to the greatest degree possible that our failures will not be repeated.

Mistakes were made in that the lines of responsibility were not clearly drawn. This resulted in an untenable business model.

A big part of this process is structuring this facility so that only one party is responsible for it...

While I regret the errors I made, I did not throw my hands in the air and walk away from the Montana soil treatment facility, I stayed involved until closure in the project.

My desire is to be a good and responsive neighbor and to provide a beneficial and improved process to my clients.

The North Dakota Health Department has justly noted the issues involved in the failure of the soil treatment facility in Montana. The draft permit is quite restrictive and short term in nature. I welcome the opportunity to prove myself.

Please do not let another mess like they had in Montana happen in our state.

Comment #36:

The owner, Mr. Livestad *[sic]*, has shown he is irresponsible and untrustworthy given his record in Fallon County in Montana.

Comment #37:

At the Hearing, I felt there was an organized group against Mr. Leivestad's plan that didn't listen to the information and had something against him personally.

Response to Comments on Suitability of Mr. Leivestad as Operator (Disclosure):

North Dakota Century Code 23-29-07.1-11 addresses an applicant's past record of operation and compliance with environmental protection laws and specifies which actions require the denial of a permit application.

23-29-07.11. Disclosure of information before issuance, renewal, transfer, or major modification of permit. Before an application for the issuance, renewal, transfer, or major modification of a permit under this chapter may be granted, the applicant shall submit to the department a disclosure statement executed under oath or affirmation. The department shall verify and may investigate the information in the statement and shall deny an application for the issuance, renewal, transfer, or major modification of a permit if the applicant has intentionally misrepresented or concealed any material fact in a statement required under this section, a judgment of criminal conviction for violation of any federal or state environmental laws has been entered against the applicant within five years before the date of submission of the application, or the applicant has knowingly and repeatedly violated any state or federal environmental protection laws. The disclosure statement must include:

1. The name and business address of the applicant.

2. A description of the applicant's experience in managing the type of solid waste that will be managed under the permit.
3. A description of every civil and administrative complaint against the applicant for the violation of any state or federal environmental protection law which has resulted in a fine or penalty of more than ten thousand dollars within five years before the date of the submission of the application.
4. A description of every pending criminal complaint alleging the violation of any state or federal environmental protection law.
5. A description of every judgment of criminal conviction entered against the applicant within five years before the date of submission of the application for the violation of any state or federal environmental protection law.
6. A description of every judgment of criminal conviction of a felony constituting a crime involving fraud or misrepresentation under the laws of any state or of the United States which has been entered against the applicant within five years before the date of submission of the application.

In addition, NDCC 23-29-04, Powers and Duties of the Department, paragraph 14, states, in part:

“In conducting the review, if the department finds that an applicant for a permit has intentionally misrepresented or concealed any material fact from the department, or has obtained a permit by intentional misrepresentation or concealment of a material fact, has been convicted of a felony or pleaded guilty or nolo contendere to a felony involving the laws of any state or the federal government within three years preceding the application for the permit, or has been adjudicated in contempt of an order of any court enforcing the laws of this state or any other state or the federal government within three years preceding the application for the permit, the department may deny the application. The department shall consider the relevance of the offense to the business to which the permit is issued, the nature and seriousness of the offense, the circumstances under which the offense occurred, the date of the offense, and the ownership and management structure in place at the time of the offense.”

Mr. Leivestad has readily admitted and disclosed the problems of the Petrocomp treatment operation in Montana. The Montana Department of Environmental Quality has provided full information regarding their dealings with Mr. Leivestad. North Dakota solid waste management law is specific on what types of violations allow for denial of a permit. The issues and problems at the Montana facility did not result in formal administrative or criminal complaints or convictions against Mr. Leivestad or his company. Therefore, the Department does not have

legal basis to deny the application based on past performance and compliance. The Department's proposed permit has a number of provisions to help monitor compliance and allow for modification or suspension of operations should problems arise. In addition, the term of the permit is limited to three (3) years.

Comments on Inspections and Sampling

There were a number of commenters who expressed concern that Petrocomp would conduct self-inspections and be responsible to collect waste samples on their own behalf. Some also expressed concern about the Department's ability to adequately inspect the facility and felt the facility needs more routine inspections and sampling of waste materials.

Comment #38:

It is my understanding that if a permit is issued and Petrocomp begins operations that the company would conduct self-inspection and reporting. Again, given this applicant's track record in Montana, a permit should not be issued unless the NDDH can identify dedicated funds within its budget to provide personnel or a qualified third party to conduct the necessary inspection and reporting. The NDDH's proposed safe guards of granting a 3-year permit instead of a 10-year permit and increasing inspection if a problem *arises* are wholly inadequate given the potentially disastrous consequences to the public once these problems occur. In fact, the reasoning behind granting the shorter 3-year permit seems like a containment scenario in lieu of using inspections as a prevention tool as evidenced in section III.A. Compliance Assurance Issues of the Public Notice of Opportunity to Comment document: "While the owner/operator has not committed to discontinue waste acceptance until any problems are resolved, the limited permit duration would also cap compliance issues if they persist." This amounts to closing the barn door after the horse is gone.

Comment #39:

. . . if a permit is granted the state needs to do inspections more than monthly or every few months. Also the state needs to collect the samples – not trust him to take them. He has proven he is not to be trusted to do that.

Comment #40:

I want to know who is going to take the samples, how often is this going to be done? I want to know how this is going to be controlled.

Comment #41:

I have visited with a Fallon County Commissioner and was informed that they feel that Mr. Leivestad sent in samples that were not from his actual operation causing the whole operation to get so far out of compliance that it was impossible to get it back on track. Having this information I would like to request that someone from the State is taking samples and checking the site monthly. I realize that this is a huge request from both the monetary and time standpoint

but I also feel it is necessary. I understand that this could possibly be done by charging Mr. Leivestad for the inspections and sampling and I would like to suggest that this be done.

Response to Comments on Inspections and Sampling:

NDAC 33-20-04.1-03, Plan of Operation, and NDAC 33-20-04.1-04 Recordkeeping and Reporting require all permitted facilities to perform self-inspections and reporting to the Department. The minimum level is an annual report required of all facilities which must include information on quantities of waste accepted, identification of occurrences and conditions that were not in compliance with the permit and rules, and any other items identified in the facility plans and permit. The proposed permit requires monthly reports to the Department describing all pertinent activities and conditions.

NDCC 23-29-08, Inspections, authorizes the Department to “inspect all solid waste management activities and facilities, at all reasonable times, to ensure compliance with the laws of this state, the provisions of this chapter, and the rules and regulations authorized herein.” However, neither the law nor rules specify how often the Department must perform inspections. It has been the policy of the Department to perform inspections more frequently for new facilities and facilities that have compliance issues. These are typically a combination of announced and unannounced inspections. The Department’s priority is compliance, not penalties, and both announced and unannounced inspections have strong value in keeping a facility in compliance.

The Division of Waste Management has five staff in the Bismarck office and two and one-half field inspectors. Field inspectors for the Department are typically paid for by the owner of such facilities, who provide money to the Department to hire an inspector independent of the facility operators. Given the size of this operation, it does not seem practicable to have a full-time employee dedicated to the site; however, it would provide some assurance if the owner/operator provided the Department with adequate resources to provide oversight. The Department could oversee inspections using existing staff, local health or environmental staff, contract staff or a combination thereof. The costs of time, travel and reporting may be higher than average for this facility given the nature of the operation, the location, the nature of the waste, public concern, etc. In addition, for testing, the Department would utilize a contract lab to do some analysis. Some parameters must be done by an out-of-state contract lab. It is recommended that a condition be placed into the final permit stating the following:

- E.14.** The owner or operator shall provide adequate funding to the Department to pay for inspection, oversight, sampling and analysis of the operation and waste materials. A fund of \$12,000.00 shall be provided to cover the cost of inspections and sampling. This amount may be adjusted annually for inflation and/or may be increased, decreased or discontinued by the Department depending on the work involved and the compliance history of the facility. The owner or operator shall provide funds within thirty (30) days of issuing the initial permit, prorated based upon time left in the state fiscal year, and the full amount by July 31 of each following year. Should adequate funds not be provided on an annual basis, the facility must discontinue operations and begin closure of the facility.

Comments on Economic Impact and Benefit

Comment #42:

I know there is more impact to roads to haul the product to the site, but there is also oil well and pipelines in Bowman County area that can utilize a business like this if managed properly.

Comment #43:

It's going to bring in five jobs they're talking about.

Comment #44:

I fail to see any benefit to North Dakota by approving his application.

Response to Comments on Economic Impact and Benefit:

Neither NDCC Chapter 23-29 nor NDAC 33-20 of the solid waste management rules address either positive or negative economic impact from the location and operation of a waste treatment unit. Local political units may enact zoning and other regulations that would address this issue:

23-29-05. Local government ordinances. Any political subdivision of the state may enact and enforce a solid waste management ordinance if such ordinance is equal to or more stringent than this chapter and the rules adopted pursuant to this chapter.

Conclusions and Recommendations

Many comments were received on a variety of topics regarding the proposed Draft Permit for the Petrocomp Special Waste Facility in Bowman County. Based on **North Dakota Century Code Chapter 23-29 Solid Waste Management** and on **North Dakota Administrative Code Article 33-20 Solid Waste Management and Land Protection**, none of the comments provided basis to deny the permit application. However, the Division agreed with some comments and proposes some modifications to the Draft Permit as described previously in the response to comments. It is our recommendation that the Draft Permit, with modifications as proposed, be approved for a period of three (3) years. A copy of the modified Draft Permit is attached.